Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

MICHAEL J. LIGHTMAN, et al.,

Petitioners,

v.

ZENITH INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the McCarran-Ferguson Act bars federal civil RICO suits in federal court which seek redress for alleged wrongs committed within California's workers' compensation system when California law expressly prohibits such civil tort suits in California's state courts because of the exclusivity of California's workers' compensation system.

PARTIES INVOLVED

The parties involved are as follows:

Michael J. Lightman, Excalibur Ventures, Inc., Lien Collections, Inc., James W. Eisenberg, James W. Eisenberg Medical Corporation, Robert Yale Libott and Robert Yale Libott, a Law Corporation (collectively "petitioners").

Zenith Insurance Company ("respondent").

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is unreported. The order of the district court (Appendix B) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 11, 1996. A timely petition for rehearing was denied on November 21, 1996. (Appendix C). A motion to file a second petition for rehearing because of a new California appellate court decision directly on point was denied on February 5, 1997. (Appendix D). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides, in relevant part: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . . "

Relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, and of other legislation referenced herein are set forth in Appendices E (McCarran-Ferguson Act), F (Racketeer Influenced and Corrupt Organizations Act), G (California Workers' Compensation Act, Labor Code) and H (California Insurance Code).

STATEMENT OF THE CASE

On October 20, 1992 Zenith Insurance Company ("Zenith") commenced suit in the federal district court against petitioners under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* ("RICO"), to recover alleged overpayments it made on 45 workers' compensation claims because of alleged fraudulent billings, and to recover its attorneys fees and costs incurred in its handling of these workers' compensation claims.

The petitioners comprise three separate groups who were all involved in California's workers' compensation system. James W. Eisenberg and James W. Eisenberg Medical Corporation (collectively "Eisenberg") provided medical services to injured workers. Michael J. Lightman, Excalibur Ventures, Inc. and Lien Collections, Inc. (collectively "Lightman") provided management and lien collection services for Eisenberg. Robert Yale Libott and Robert Yale Libott, a Law Corporation (collectively "Libott") provided legal services to Eisenberg.

Petitioners moved to dismiss Zenith's suit on the ground that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, barred Zenith's RICO suit. The district court agreed and granted petitioners' motion. The court of appeals reversed on the sole ground that application of RICO would not invalidate, impair or supersede California's workers' compensation system.

JURISDICTION BELOW

The district court had jurisdiction pursuant to 18 U.S.C. § 1964(a) and 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

California statutory and case law state, without equivocation, that civil redress of the kind sought by Zenith for alleged wrongs committed within California's workers' compensation system are to be exclusively determined within that workers' compensation system. The court below ignored this unambiguous California law, as well as relevant decisions of the Court and other federal courts, and held that RICO can be used by Zenith in a federal court to secure civil redress for alleged wrongs committed by petitioners within California's workers' compensation system. The net effect of the court below's decision is to open the federal courts in California, as well as in the rest of the Ninth Circuit, to civil claims under RICO for alleged wrongs committed within a state's workers' compensation system. Federal district courts will be called upon to adjudicate the very issues mandated by California law to be exclusively determined by California's Workers Compensation Appeals Board ("WCAB") if the decision of the court below stands.

Whether the McCarran-Ferguson Act precludes RICO civil suits involving California's workers' compensation system in federal courts in California, when such suits cannot be brought in California's state courts, raises a substantively important federal jurisdiction issue which has far reaching implications and ramifications on state

regulation of state workers' compensation systems, as well as upon the business of the federal courts.

In addition, because the Ninth Circuit seemingly stands alone in its willingness to sanction such use of RICO in federal court, despite the McCarran-Ferguson Act, a need for creating uniformity as to federal jurisdiction in this area now exists. Whether a right exists to pursue a claim in federal court under federal law for alleged wrongs committed within a state's workers' compensation system cannot, and should not, be dependent upon which circuit is involved. If those involved in workers' compensation systems in states outside the Ninth Circuit are protected from RICO suits by the McCarran-Ferguson Act, so too should those involved in California's workers' compensation system be so protected. Only the Court can now resolve this federal jurisdiction issue and define the scope of the McCarran Ferguson Act's protection in this context.

I.

The Decision Of The Court Below Conflicts With Decisions By The California Supreme Court And California Courts Of Appeal Regarding The Exclusivity Of The California Workers' Compensation System

It is well established that a refusal by the court of appeals to follow decisions of a state's intermediate appellate court on matters as to which state laws and decisions are applicable warrants the granting of certiorari. *Six Companies v. Joint Highway Dist. No. 13,* 311 U.S. 180, 188 [61 S.Ct. 186, 188, 85 L.Ed.2d 114] (1990).

In *Marsh & McLennan, Inc. v. Superior Court*, 49 Cal.3d 1, 5-6 [259 Cal.Rptr. 733] (1989), the California Supreme Court stated:

> The Workers' Compensation Act (Act), codified in section 3201 et seq. of the Labor Code, sets forth an elaborate scheme for the compensation of California employees injured in the course and scope of their employment. Labor Code section 3602 expressly states that the right to recover workers' compensation benefits is "the sole and exclusive remedy" available to an injured employee against his employer. Moreover, the WCAB has exclusive jurisdiction over the disputes regarding an employee's right to compensation or the liability of an employer. (§ 5300, subds. (a) & (b).)
>
> The exclusive remedy provisions of the system are designed to provide "a quick, simple and readily accessible method of claiming and receiving compensation." (*Everfield v. State Comp. Ins. Fund* (1981) 115 Cal.App.3d 15, 20, [171 Cal.Rptr. 164].)

Insurance companies play a key role in this workers' compensation system. *See* Cal. Lab. Code §§ 3700(a), 3753 and 3755. In *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 627 [102 Cal.Rptr. 815] (1972), the California Supreme Court stated with respect to that role:

> Like safety inspections or the providing of medical care, such nonmedical investigation constitutes a service "inextricably interwoven" with the insurer's status. In our system of compensation, no one else is in a better position, with resources at command, to detect fraudulent, or grossly exaggerated claims for benefits.

> No other party has the financial motivation for avoiding liability for spurious claims, since the insurer is ordinarily substituted for the employer and assumes his compensation liability. (Lab. Code §§ 3755-3758.) The detection of spurious and unfounded claims benefits the workmen's compensation scheme by excluding them from the already heavily burdened administrative process of the Board.

In addition to insurers, lien claimants such as petitioners are also considered parties in interest under the California Workers' Compensation Act, *Independence Indem. Co. v. Industrial Acc. Com.*, 2.Cal.2d 397 [41 P.2d 320] (1935), and are subject to the WCAB's jurisdiction. *American International Adjustment Co., Inc. v. Crawford*, ___ Cal.App.4th ___ [60 Cal.Rptr.2d 123, 126] (1997).

Thus, everything of which Zenith complains, namely the submission of alleged fraudulent billings to settlement or adjudication of such billings, is regulated by the California Workers' Compensation Act. The WCAB routinely determines the reasonableness of physicians' bills, and reduces the amount of these bills if it agrees with the objecting party. Cal. Lab. Code § 4621 (the WCAB may only award payment for services "reasonably, actually and necessarily incurred"); *Turudich v. Industrial Acc. Com.*, 237 Cal.App.2d 455, 458 [47 Cal.Rptr. 21] (1965).

In determining whether a claim falls within the jurisdiction of the WCAB, all doubt must be resolved in favor of the WCAB's jurisdiction. *Mitchell v. Scott Wetzel Services, Inc.*, 227 Cal.App.3d 1474, 1480 [278 Cal.Rptr. 474] (1991); *Foremost Dairies, Inc. v. Industrial Acc. Comm.*, 237 Cal.App.2d 560 [47 Cal.Rptr. 173] (1965). If a dispute is

connected to the payment of workers' compensation benefits, it falls within the exclusive jurisdiction of the WCAB. *Mitchell v. Scott Wetzel Services, Inc., supra* at 1481; Cal. Lab. Code §§ 4625 and 5300.

Efforts in California courts to inject RICO into this system, or to otherwise avoid the WCAB through civil litigation, have all been rejected. In *American International Group, Inc. v. Superior Court,* 234 Cal.App.3d 749 [285 Cal.Rptr. 765] (1991), *cert. denied,* 504 U.S. 911 [112 S.Ct. 1944, 118 L.Ed.2d 549] (1992), the court of appeal issued a writ of mandate directing the trial court to dismiss a policyholder's RICO suit against its workers' compensation carrier for alleged misrepresentation in the sale of the policy. The court held that allowance of a RICO suit would invalidate, impair or supersede California insurance law. As stated by the court:

> California has enacted comprehensive legislation expressly designed to regulate the business of insurance. Indeed, it was initially enacted in 1959 in direct response to McCarran-Ferguson. That legislation expressly includes as a prohibited act the very conduct which is asserted here by Brutoco as the basis for its RICO claim. However, it does not provide for a private right of action, but rather only administrative remedies. (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 304-305 [250 Cal.Rptr. 116, 758 P.2d 58]; *Tricor California, Inc. v. Superior Court* (1990) 220 Cal.App.3d 880, 882-883, 885-888 [269 Cal.Rptr. 642].)
>
> California has also specifically undertaken extensive legislative control and regulation of

> workers' compensation insurance rates, including premium refunds and dividends. . . .

Id. at 764-765.

> Allowance of a RICO action seeking civil damages (including treble damages and attorney fees) for the very conduct which California has chosen to regulate administratively would subvert and subsume the existing statutory scheme. It would permit a civil damage recovery where our Supreme Court has recently and explicitly held that none was intended. (*Moradi-Shalal v. Firemen's Fund Ins. Co., supra,* 46 Cal.3d at pp. 304-305.) This would not be the first time that creative litigation efforts had been unsuccessfully expended to get around that decision. *See e.g., Maler v. Superior Court* (1990) 220 Cal.App.3d 1392, [270 Cal.Rptr. 222] (where we held that a statutory bad faith claim for damages could not be recast as unfair competition and prosecuted under Bus. & Prof, Code section 17200, et seq.)

Id. at 767-768.

There is no way to reconcile the court below's decision herein with *American International,* none whatsoever. That is because under California law it is the WCAB which has the *exclusive* jurisdiction to determine the propriety of medical bills generated in the workers' compensation system. Cal. Lab. Code §§ 3201, *et seq.; Marsh & McLennan, Inc. v. Superior Court, supra; American International Adjustment Co., Inc. v. Crawford, supra; American Psychometric Consultants v. Workers' Comp. Appeals Bd.,* 36 Cal.App.4th 1626 [43 Cal.Rptr.2d 254] (1995). Moreover, California's regulation of this system is comprehensive. It

includes a workers' compensation fraud reporting system (Cal. Ins. Code § 1877, *et seq.*), criminal penalties for making false or fraudulent claims (Cal. Ins. Code § 1871.4), a detailed civil action procedure (Cal. Ins. Code § 1871.7) and restitution of compensation resulting from fraudulent conduct (Cal. Ins. Code § 1871.5). The analysis of RICO's impact set forth in *American International* is directly applicable. At a minimum, the court below should have addressed this California law in its decision.

In a case decided after briefing was concluded, but raised at oral argument, *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd., supra,* the court addressed the issue of whether the type of relief sought by Zenith herein could be claimed apart from California's workers' compensation system. Rejecting such effort, the court stated:

> It has to be possible to eliminate fraudulent claims for medical-legal evaluations without destroying the entire workers' compensation system. Of most concern here is the element of transactional stability. We believe transactional stability an important element of any benefit system. Approving restitution in these cases would set a precedent which would have unfortunate consequences for the workers' compensation system. It would introduce the possibility of continued transactional instability so negative it would impact the number of medical providers willing any longer to participate in the system by evaluating workers with industrial injuries. No one can operate a business on receipts only conditionally possessed, and medical providers are no exception. Thus we have

> determined the restitution orders were unfair and must be annulled.

Id., 36 Cal.App.4th at 1647.

If the court below's decision is allowed to stand the "transactional stability" which *American Psychometric* held to be "an important element" of California's workers' compensation system will be destroyed. Indeed, the court's concern in *American Psychometric* about medical providers being willing to participate in the workers' compensation system in the absence of this "transactional stability" is real. The court below simply ignored this case, as well as all California law, in its decision.

On January 13, 1997, the California court of appeal, in *American International Adjustment Co., Inc. v. Crawford, supra,* expressly rejected the type of suit brought by Zenith. As stated by the court:

> Compensation for work-related injuries should be swift and sure, employers and workers have agreed. Fraudulent medical-legal claims corrupt this bargain by penalizing insurers who pay medical bills rather than challenge them. The net effect: soaring workers' compensation premiums, higher transaction costs, and reduced benefits for injured workers.
>
> We are sensitive to the delicate balance between combating fraud against employers and providing speedy and adequate compensation to employees. So, too, is the Legislature which, in recent years, has enacted a series of carefully tailored measures to investigate suspicious medical claims and to eliminate fraudulent ones.

It is for this reason that we are unwilling to sanction the crude, blunderbuss type of tort weapon plaintiff proposes. Plaintiff, workers' compensation insurer, filed a massive tort lawsuit against a group of medical clinics that allegedly engaged in fraudulent billing practices in 158 separate workers' compensation claims. The trial court sustained the demurrer on the ground that the California workers' compensation system preempted the civil claims. Plaintiff also filed a parallel action for reimbursement for the same 158 claims through the workers' compensation system.

We affirm the judgment of dismissal of the tort suit. The exclusive jurisdiction of the Workers' Compensation Appeals Board (WCAB) is not limited to employees and employers, but extends to all suits over compensation and payment of benefits to injured workers. Just as the WCAB's jurisdiction covers bad faith or fraud claims against workers' compensation carriers, so too it covers fraud claims against medical or medical-legal lien claimants.

Fraudulent workers' compensation claims should be stopped at the source, in the workers' compensation system. Medical clinics that submit false medical-legal evaluations can be detected and halted under existing law, which sets up a tripartite scheme involving the WCAB, the insurance commissioner and public prosecutors.

Id., 60 Cal.Rptr.2d at 125-126.

Zenith has candidly admitted that it brought its RICO suit in the federal district court because of dissatisfaction with remedies in the California workers' compensation system, (R.T. July 20, 1993, at 14: 12-21, Appendix I), and that its purpose in bringing its RICO suit is to recover costs and attorneys' fees expended in dealing with workers' compensation claims in California's workers' compensation system. *Id.* Whether Zenith can use RICO for that purpose is a question of exceptional importance because its answer will impact significantly both the California workers' compensation system and the business of the federal district court.

California has said that redress of the type claimed by Zenith for the wrongs alleged by Zenith is to be found exclusively within California's workers' compensation system, and not in California's judicial system. *American International Adjustment Co., Inc. v. Crawford, supra,* 60 Cal.Rptr.2d at 125-126. California has also said that application of RICO to California's workers' compensation system would "impair, invalidate or supersede" that system. *American International Group Inc. v. Superior Court, supra,* 234 Cal.App.3d at 767-768. However, unless the Court now grants certiorari, California's efforts to regulate and control its workers' compensation system will be for naught because RICO will be available in federal courts in California as a federal remedy for anyone who believes he or she was wronged in California's workers' compensation system.

II.

The Decision of The Court Below Conflicts with Decisions Of Other United States Courts of Appeals and Federal District Courts On the Applicability Of The McCarran-Ferguson Act To The Business Of Insurance

The question of whether federal courts will be open to RICO suits which seek redress for alleged wrongs committed within a state's workers' compensation system, or within a similar highly regulated aspect of a state's "business of insurance", is of significant importance throughout the United States. At present, there are conflicting views in the courts of appeals and district courts on this issue. This conflict warrants certiorari being granted. *Calhoun v. Harvey,* 379 U.S. 134, 137 [85 S.Ct. 292, 295, 12 L.Ed.2d 190] (1964).

In addition, there is an almost uniform reluctance by both federal and state courts to inject RICO into a state's regulation of the "business of insurance." Accordingly, the decision of the court below is "out of line with the authorities," thus warranting the granting of certiorari. *Braen v. Pfeifer Oil Transportation Co.,* 361 U.S. 129, 130 [80 S.Ct. 247, 248, 4 L.Ed.2d 191] (1959).

Federal and state courts have adopted a four-part test to determine whether Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), will apply to preclude a suit based upon a federal statute. Preclusion will occur if: (1) the federal law does not relate to the "business of insurance"; (2) the complained of activity involves the "business of insurance"; (3) the state has enacted legislation for the purpose of regulating that aspect of the

"business of insurance," and, (4) application of the federal law would "impair, invalidate or supersede" such state legislation. *Merchants Home Delivery Service, Inc. v. Frank B. Hall,* 50 F.3d 1486, 1489 (9th Cir. 1995), *cert. denied,* ___ U.S. ___ [116 S.Ct. 418, 133 L.Ed.2d 335] (1995); *American International Group, Inc. v. Superior Court, supra,* 234 Cal.App.3d at 749.

Inherent in the decision of the court below is the conclusion that the first three factors were met. It is the fourth factor alone, namely that allowance of a RICO suit will not "impair, invalidate or supersede" California's workers' compensation system, which forms the basis of the court below's decision.

The court below's decision is based entirely upon its decision in *Merchants Home, supra.* No other authority is cited or discussed. In *Merchants Home* the pertinent issue was whether a national shipping company's suit against its insurance broker under RICO was precluded by the McCarran-Ferguson Act, and specifically whether allowance of such suit would "impair, invalidate or supersede" California insurance law. *Merchants Home* held it would not because RICO prohibited the same acts as were prohibited by California law. *Merchants Home, supra,* 50 F.3d at 1492.

Merchants Home, as extended herein, affords little, if any, McCarran-Ferguson Act protection to a defendant who is sued for violating RICO in a context involving a regulated aspect of the "business of insurance." Moreover, *Merchants Home* is not accepted by other courts of appeals which have considered this issue. See *Kenty v. Bank One, Columbus, N.A.,* 92 F.3d 384, 392 (6th Cir. 1996)

(McCarran-Ferguson Act precluded RICO action against insurance company because "different liability under Ohio law for violations, as well as different standards of proof necessary to demonstrate misrepresentations, means that RICO does impair the ability of Ohio to regulate this type of behavior"); *Ambrose v. Blue Cross & Blue Shield of Virginia,* 891 F.Supp. 1153 (E.D. Va. 1995), *aff'd without opp.,* 95 F.3d 41 (4th Cir. 1996) (McCarran-Ferguson Act precluded RICO action against insurance company because the "forum for redress would shift from [Virginia's State Corporation Commission] to the federal courts").

District courts in California, with one exception, have held that the McCarran-Ferguson Act precludes RICO suits where the business of insurance is involved. Compare *Gordon v. Ford Motor Credit Co.,* 868 F.Supp. 1191 (N.D.Cal. 1992) and *LeDuc v. Kentucky Cen. Life Ins. Co.,* 814 F.Supp. 820 (N.D.Cal. 1992) with *Thacker v. New York Life Ins. Co.,* 796 F.Supp. 1338 (E.D.Cal. 1992).

In *Gordon v. Ford Motor Credit Co., supra,* 868 F.Supp. at 1196-97, the court stated:

> "California has enacted comprehensive legislation expressly designed to regulate the business of insurance." . . . Thus, this court finds that California has enacted laws regulating the activities being challenged. Furthermore, given California's extensive regulation of the insurance industry, this court concludes that application of RICO would impair, invalidate, and supersede the body of substantive laws which California has enacted to govern insurance practices in this state.

In *LeDuc v. Kentucky Central Life Insurance Co., supra,* 814 F.Supp. at 829, the court stated:

> The application of a federal statute to matters regulated by state insurance law would arguably impair state law. For instance, RICO violations include treble damages and attorneys' fees. The California Legislature has not provided such remedies for misrepresentations regarding an insurance company's financial condition. In fact, applying RICO would nullify the state's determination of the appropriate remedies for certain conduct and would supersede remedies and regulatory supervision provided by California law.

District courts in other states have reached identical conclusions. *See, e.g., Doe v. Norwest Bank Minnesota, N.A.,* 909 F.Supp. 668, 673 (D. Minn. 1995) (rejecting *Merchants Home*); *Ambrose v. Blue Cross & Blue Shield of Virginia, supra* (rejecting *Merchants Home*); *Forsyth v. Humana, Inc.,* 827 F.Supp. 1498, 1520 (D.Nev. 1993), *aff'd in part, rev'd in part,* 99 F.3d 1504 (9th Cir. 1996); *Wexco, Inc. v. IMC, Inc.,* 820 F.Supp. 194, 203-4 (M.D. Pa. 1993); *Everson v. Blue Cross & Blue Shield of Ohio,* 898 F.Supp. 532, 542-45 (N.D. Ohio 1994). In *Doe, supra,* the court stated:

> A much more difficult question is presented when the Court considers whether the application of RICO to the conduct in question would "invalidate, impair or supersede" the comprehensive Minnesota legal regulation of insurance, but it is not thoroughly considered by the parties. Plaintiffs argue that Minnesota law does not allow a private cause of action for violations of the Minnesota Unfair Claims Practices Act, and that permitting such a claim in a RICO

action would allow a remedy in federal court that is not available in state court. This would not invalidate or supersede the state law, but it may impair it.

In *Merchant's Home Delivery, supra,* the Court rejected an argument like the one presented by Plaintiffs herein. It concluded that although the practices in question were the "business of insurance," the RICO action was not preempted because allowing the additional remedies of RICO leaves the state laws intact. It concluded that Congress had not intended "to allow states to preempt the field in the regulation of the business of insurance." 50 F.3d at 1491. The Court stated:

"If Congress had intended to cede the field, it could have said: 'No federal statute shall be construed to *apply* to the business of insurance.' Instead, it allowed federal statutes to apply unless they conflict with the states' statutes." 50 F.3d at 1492. (Emphasis in original.) The parties do not discuss this holding in *Merchant's Home Delivery.*

The Court of Appeals for the Eighth Circuit has not reached a conclusion on this issue. It is unclear whether that Court would adopt the reasoning of the Ninth Circuit, or would reach a different conclusion, perhaps persuaded by the reasoning of the District Courts in the cases considered below.

In *Wexco Inc.*, the Court reasoned:

> "The availability of a federal private action under RICO would not merely nullify the state's chosen regulatory remedies for insurance entity misconduct. Rather, this

> court believes that the availability of a federal private remedy which would reward successful business plaintiffs, such as the captioned parties, with treble damages, costs and attorney fees cannot help but upset the balance of relationships between insurance entities and insureds which are established and regulated [by the State]."

Wexco, supra, 820 F.Supp. at 204. The Court reached a similar conclusion in *Forsyth v. Humana, Inc., supra,* 827 F.Supp. at 1521-1522. *See also LeDuc v. Kentucky Central Life Ins. Co., supra,* 814 F.Supp. at 829.

> There is substantial debate concerning the ever expanding use of the Racketeer Influenced and Corrupt Organizations Act to reach activity which seems removed from the criminal enterprises which were the principal focus when it was adopted. With that in mind, and in a legal environment raising renewed issues of federalism, *it is concluded that the Congress would not have intended that comprehensive state regulation of insurance would be supplemented by the remedies in RICO.* Rather, the preemption of the McCarran-Ferguson Act should be applied to the claims brought in this action against Voyager Guaranty Insurance Company. [Emphasis added]

It is the Court alone which now has the jurisdiction to put an end to this "substantial debate," and to resolve the ever increasing division among the federal courts over RICO's availability in litigation concerning aspects of the "business of insurance" which are regulated by state law. No more fitting case exists to deal with this issue than this case where, on the one hand, California law has made unequivocally clear its position as to the

inapplicability of civil tort litigation and RICO in the workers' compensation system, and where, on the other hand, the Ninth Circuit has simply ignored this California law in its interpretation of McCarran-Ferguson Act inapplicability.

III.

The Decision Of The Court Below Apparently Conflicts With Relevant Decisions Of the Court Which Have Construed The McCarran-Ferguson Act In Connection with The Business of Insurance

Petitioners submit that the decision of the court below appears to be in conflict with the Court's precedents. If so, a further basis for granting certiorari exists. *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 [102 S.Ct. 2118, 2121, 2122, 72 L.Ed.2d 520] (1982).

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, was passed by Congress in 1945. Its purpose was two-fold: one, to preclude application of federal law to activities involving the "business of insurance" where the purpose of state law is to regulate such activities; and two, to provide a limited exemption from federal antitrust laws to insurance companies for conduct by insurance companies which constitutes the "business of insurance." 15 U.S.C. § 1012(b). Section 1012(b) reads, in pertinent part:

> No act of Congress shall be construed to invalidate, impair or superseded any law enacted by any state for the purpose of regulating the business of insurance. . . .

According to the most recent pronouncement by the Court, the term "business of insurance," as used in the McCarran-Ferguson Act, is to be construed *narrowly* where antitrust exemption for insurance company conduct is involved, and *broadly* when state law regulation of the "business of insurance" is involved. *U.S. Dept. of Treasury v. Fabe,* 508 U.S. 491, 505-508 [113 S.Ct. 2202, 2210-2212, 124 L.Ed.2d 449] (1993). Because this case involves activities regulated by state law, not insurance company antitrust conduct, the broad construction of the term "business of insurance" must be used.

Consistent with this mandate is the Court's prior conclusion that the "claims adjustment process" involves the "business of insurance." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 133 n.8 [102 S.Ct. 3002, 3011 n.8, 73 L.Ed.2d 647] (1982). The court below obviously reached the same conclusion.

The apparent conflict arises because the court below, though acknowledging it was dealing with the "business of insurance," went on to conclude that RICO does not "impair, invalidate or supersede" a state law remedial process which state law has held to be *exclusive.* How, consistent with *Fabe,* can a federal remedy be imposed upon a state's exclusive remedial process and not be held to "impair, invalidate or supersede" that process? The answer seems obvious. It cannot. That is especially true when a state appellate court has held that application of RICO to the state's workers' compensation system would "impair, invalidate or supersede" state law. *American International Corp. Inc. v. Superior Court, supra.*

Though petitioners recognize that the Court has not yet addressed the issue of how a court is to determine whether a federal law "impairs, invalidates or supersedes" state law, *Fabe* has defined a standard by which it can be said that, unless antitrust issues are involved, the McCarran-Ferguson Act is to be liberally construed in favor of application so as to preclude use of a federal law where state regulation of the "business of insurance" is involved.

IV.

The Decision Of The Court Below Opens The Door To Federal Court Forum Shopping In California

The court below has opened the federal courts in the Ninth Circuit to RICO suits by anyone who believes he or she has suffered a wrong within a state's workers' compensation system. That is the undeniable conclusion of the Ninth Circuit trilogy of opinions in *Merchants Home Delivery Service, Inc. v. Frank B. Hall, supra,* this case and, most recently, *Forsyth v. Humana, Inc.*, 99 F.3d 1504 (9th Cir. 1996). What cannot be claimed in a California state court under state tort law is now available across the street in a federal court.

RICO is not, and was never intended to be, a part of California's workers' compensation system. If it is ever to be a part of that system, it is the California legislature which must make that decision, not the court below. Indeed, in light of California law, it is difficult to perceive a more appropriate case for application of the McCarran-Ferguson Act than this case.

The time is ripe to resolve this federal jurisdiction issue. Practitioners in the Ninth Circuit and throughout the United States deserve such resolution. Indeed, if the Ninth Circuit's position is allowed to stand, it is arguable that counsel for American International Adjustment Co. may have committed malpractice by filing a civil tort suit in state court as opposed to filing a RICO suit in federal court. If, however, the Ninth Circuit is correct, then RICO ought to be available as an additional remedy throughout the United States, not just in the Ninth Circuit.

V.

At A Minimum Certiorari Should Be Granted And The Case Ordered Remanded To The Court Below In Light Of The Decision By The California Court of Appeal In American International Adjustment Co. Inc. v. Crawford, ___ Cal.App.4th ___, [60 Cal.Rptr.2d 123] (1997)

Subsequent to the court below's decision herein, and its denial of petitioner's timely petition for rehearing, the California Court of Appeal issued its opinion in *American International Adjustment Co., Inc. v. Crawford, supra.* In that case, the court held that civil suits such as that brought by Zenith to recover damages resulting from alleged fraudulent billing practices in California's workers' compensation system *cannot* be brought. Rather, the *exclusive* method for dealing with alleged fraudulent billing practices within California's workers' compensation system is to be found under California law. As stated by the court:

> Fraudulent workers' compensation claims should be stopped at the source, in the workers' compensation system. Medical clinics that submit false medical-legal evaluations can be

> detected and halted under existing law, which sets up a tripartite scheme involving the WCAB, the insurance commissioner and public prosecutors.

Id. at 126.

Because *American International Adjustment Co.* was decided after the court below decided this matter, and after the petitioner's petition for rehearing was denied, petitioners did not have an opportunity to bring this decision to the court below's attention within the specified jurisdictional time period. Petitioners did attempt to bring this case to the attention of the court below by filing a motion for permission to file a second petition for rehearing. That motion was denied on February 5, 1997. (Appendix D).

In *Exxon Co. U.S.A. v. Banque de Paris et des Pays-Bas,* 488 U.S. 920 [109 S.Ct. 299, 102 L.Ed.2d 319] (1988) the Court granted a petition for certiorari and then remanded the case to the court of appeals for the Fifth Circuit because of a recent Texas intermediate appellate court decision. At a minimum, that same procedure is warranted herein.

CONCLUSION

For the reasons stated above, petitioners request that their petition for a writ of certiorari be granted.

DATED: February 19, 1997

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY,

Plaintiff-Counter-defendant-Appellant/Cross-Appellee,

v.

JAMES W. EISENBERG, an individual; JAMES W. EISENBERG, M.D., a California corporation, d/b/a AMERIMED MEDICAL CORPORATION; ELEVENTH AVENUE MEDICAL GROUP; EAST L.A. COUNTY MEDICAL GROUP; VALLEY RIDGE MEDICAL GROUP; BAY MEDICAL GROUP and SAND POINT MEDICAL GROUP; LIEN COLLECTION, INC.,

Defendants-Counter-claimants-Appellees/Cross-Appellants,

and

Nos. 94-55983
94-56188
94-56138

D.C. No.
CV-92-06267-AAH
(VT)

MEMORANDUM*

(Filed
Oct. 11, 1996)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

MICHAEL J. LIGHTMAN; EXCALIBUR VENTURES, INC., d/b/a CIVIC CENTER MANAGEMENT; ROBERT YALE LIBOTT, an individual; and ROBERT YALE LIBOTT, a law corporation, d/b/a CIVIC LAW CENTER,

Defendants-Counter-claimants-Appellees.

Appeal from the United States District Court for the Central District of California A. Andrew Hauk, District Judge, Presiding

Argued and Submitted January 11, 1996 Pasadena, California

Filed

Before: BRIGHT,** NORRIS and WIGGINS, Circuit Judges

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, provides that state laws enacted for the purpose of regulating the insurance industry inversely preempt federal laws of general applicability.[1] 15 U.S.C.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

[1] Section 2 of the Act provides, in relevant part:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

§ 1012. In *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir. 1995), we held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, was not inversely preempted by the California statutes regulating insurance because both the California insurance statutes and RICO prohibited the same fraudulent acts. This case is squarely controlled by *Merchants Home*, although the state insurance laws at issue are workers' compensation insurance laws.

Appellant Zenith Insurance Company ("Zenith") issues workers' compensation insurance policies to employers. In October 1992, it filed an action in the district court against appellees James Eisenberg, a doctor, Robert Yale Libott, a lawyer, Michael Lightman, a manager, and appellee corporations owned or managed by one of the three individual appellees. In its complaint, Zenith alleged that appellees violated RICO and state fraud laws. Zenith's factual allegations fell into two main categories. First, Zenith alleged that appellees recruited uninjured workers to file bogus workers' compensation claims against their employers. Second, Zenith alleged that appellees submitted fraudulently inflated bills for medical and legal services that appellees provided to injured and uninjured workers.

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012.

Appellees moved to dismiss Zenith's RICO claims on the ground that they were inversely preempted by state law under the McCarran-Ferguson Act. The district court granted the motion without a statement of reasons. The court also dismissed Zenith's pendent state law claims without prejudice.

While the case was pending on appeal, our court decided *Merchants Home*. In *Merchants Home*, a national shipping company retained an insurance broker to secure insurance policies and to process claims for which the company self-insured. The company claimed that the insurance broker had defrauded it in three ways: (1) by overbilling for premiums on actual insurance policies, (2) by billing for premiums on fictitious policies, and (3) by billing for self-insured claims that were never paid to claimants. *Merchants Home*, 50 F.3d at 1488. The question presented was whether the McCarran-Ferguson Act precluded application of RICO on the facts of the case.

The McCarran-Ferguson Act precludes the application of a federal statute if: (1) the statute does not "specifically relate" to the business of insurance, (2) the acts challenged under the statute constitute the business of insurance, (3) the state has enacted a law or laws regulating the challenged acts, and (4) the state law would be superseded, impaired or invalidated by application of the federal statute. *Id.* at 1489. All four factors must be satisfied. *Id.*

In *Merchants Home*, our analysis centered, in part, on the fourth element. As to the question whether application of RICO would "invalidate, impair, or supersede" California law, we decided that "application of a federal statute prohibiting acts which are also prohibited under a

state's insurance laws does not 'invalidate, impair, or supersede' the state's laws under § 2(b) of the McCarran-Ferguson Act." *Id.* at 1492. Accordingly, we held that the shipping company's civil RICO action for insurance fraud was not preempted by state law under the McCarran-Ferguson Act.

This case, like *Merchants Home*, involves allegations of insurance fraud. Specifically, Zenith alleges (1) that appellees recruited uninjured workers to file fictitious workers' compensation claims insured by Zenith, and (2) that appellees overbilled Zenith for medical and legal services to workers whose employers were insured by Zenith. Also like *Merchants Home*, the case involves alleged fraudulent practices that are prohibited both under California law and under the federal RICO statute.

We hold that this case is controlled by *Merchants Home* because there is no principled basis for distinguishing, for McCarran-Ferguson Act purposes, between the alleged insurance fraud in that case and the alleged insurance fraud in this case. And *Merchants Home* instructs that in a case such as this, RICO does not impermissibly "invalidate, impair, or supersede" California law. Accordingly, the McCarran-Ferguson Act does not prohibit application of RICO in this case.

Appellees argue that application of RICO would "impair" California law because Zenith's action for damages "would upset the delicate balance established by the California Legislature" when it created the workers' compensation system. Appellees' Br. at 22. This argument is, however, foreclosed by *Merchants Home*. In that case, the defendant made a similar argument: to wit, that a private action under civil RICO "would upset the balance struck

by California's insurance code, which, in general, allows only administrative enforcement and actual damages." *Merchants Home*, 50 F.3d at 1491 (citation omitted). We rejected this argument and adopted the Seventh Circuit's rule that "state and federal laws proscribing identical conduct do not conflict with or displace each other, and may coexist under the McCarran-Ferguson Act." *Id.* at 1492 (citing *National Ass'n for the Advancement of Colored People v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992)).

We also explained in *Merchants Home* that the language of the McCarran-Ferguson Act is inconsistent with appellees' "delicate balance" argument.

> First, [the Act's] exemption of federal laws which specifically relate to the business of insurance weighs against a congressional intent wholly to abandon the field to the states. Second, only federal statutes which "invalidate, impair, or supersede" state insurance statutes are "preempted." If Congress had intended to cede the field, it could have said: "No federal statute shall be construed to *apply* to the business of insurance." Instead, it allowed federal statutes to apply unless they conflict with the states' statutes.

Id.

Following *Merchants Home*, we **REVERSE** the judgment and **REMAND** for further proceedings.[2]

---

[2] We construe the district court's order of June 14, 1994 as a stay pending appeal, which dissolves upon filing of this disposition.

APPENDIX B

RONALD M. GREENBERG (SBN 035953)
RONALD M. GREENBERG, A Professional Corporation

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Attorneys for Defendants and Counterclaimants
MICHAEL J. LIGHTMAN, EXCALIBUR VENTURES, INC. and LIEN COLLECTIONS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZENITH INSURANCE COMPANY, a California corporation, Plaintiff, v. JAMES W. EISENBERG, etc., et al., Defendants. AND RELATED CROSS ACTIONS.	CASE NO. CV 92 6267 AAH(Tx) ORDER (Filed Jun. 14, 1994)

On Monday, May 16, 1994, defendants' Motion to Dismiss and Motion for Abstention and plaintiff's Motion to Confirm Jurisdiction came on regularly for hearing

before this Court. Lary A. Rappaport appeared as counsel for plaintiff; Robert F. Mangels and Michael Goch appeared as counsel for defendants James W. Eisenberg and James W. Eisenberg Medical Corporation; Ronald M. Greenberg and Mitchell D. Kamarck appeared as counsel for Michael J. Lightman, Excalibur Ventures, Inc. and Lien Collections, Inc.; and Donald C. Smaltz appeared as counsel for Robert Yale Libott and Robert Yale Libott, A Law Corporation.

After full consideration of the moving papers, oppositions thereto, the arguments of counsel and the pleadings, papers, records and exhibits on file in this case:

IT IS HEREBY ORDERED that plaintiff's first and second claims for relief are dismissed with prejudice; and, plaintiff's third and fourth claims for relief are dismissed without prejudice.

IT IS FURTHER ORDERED that the respective counterclaims of Lien Collections, Inc. and James W. Eisenberg Medical Corporation are voluntarily dismissed without prejudice.

Dated: 6/14/94

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES
DISTRICT JUDGE

Submitted by:

RONALD M. GREENBERG
RONALD M. GREENBERG, A Professional Corporation

MITCHELL D. KAMARCK
ROSENFELD, MEYER & SUSMAN

By /s/ Mitchell Kamarck
Mitchell D. Kamarck
Attorneys for Michael J. Lightman
Excalibur Ventures, Inc. and
Lien Collections, Inc.

ROBERT E. MANGELS
JEFFER, MANGELS, BUTLER & MARMARO

and

MICHAEL GOCH

By /s/ Robert Mangels (by MDK)
Robert E. Mangels
Attorneys for Defendants and
Counterclaimants James W. Eisenberg
and James W. Eisenberg Medical Corporation

DONALD C. SMALTZ
WILLIAM F. FAHEY
EMILY A. BRECKENRIDGE
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By /s/ Donald Smaltz (by MDK)
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APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY, Plaintiff-Counter-defendant-Appellant, v. JAMES W. EISENBERG, n individual; JAMES W. EISENBERG, M.D., a California corporation, d/b/a AMERIMED MEDICAL CORPORATION, ELEVENTH AVENUE MEDICAL GROUP, BAY MEDICAL GROUP, and SAND POINT MEDICAL GROUP; MICHAEL J. LIGHTMAN; EXCALIBUR VENTURES, INC., d/b/a CIVIC CENTER MANAGEMENT; ROBERT YALE LIBBOTT, an individual; and ROBERT YALE LIBBOTT, a law corporation, d/b/a a CIVIC LAW CENTER, Defendants-Counter-claimants-Appellees.	Nos. 94-55983 94-56188 94-56138 D.C. No. CV-92-06267-AAH (VT) **ORDER** (Filed Nov. 21, 1996)

Before: NORRIS, WIGGINS, and BRIGHT,* Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judge Wiggins has voted to reject the suggestion for a rehearing en banc, and Judges Norris and Bright have recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED,** and the suggestion for a rehearing en banc is **REJECTED.**

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY, Plaintiff-Counter-defendant-Appellant, v. JAMES W. EISENBERG, an individual; JAMES W. EISENBERG, M.D., a California corporation, d/b/a AMERIMED MEDICAL CORPORATION, ELEVENTH AVENUE MEDICAL GROUP, BAY MEDICAL GROUP, and SAND POINT MEDICAL GROUP; MICHAEL J. LIGHTMAN; EXCALIBUR VENTURES, INC., d/b/a CIVIC CENTER MANAGEMENT; ROBERT YALE LIBBOTT, an individual; and ROBERT YALE LIBBOTT, a law corporation, d/b/a a CIVIC LAW CENTER, Defendants-Counter-claimants-Appellees.	Nos. 94-55983 94-56188 94-56138 D.C. No. CV-92-06267-AAH (VT) **ORDER** (Filed Feb. 5, 1997)

Before: NORRIS, WIGGINS, and BRIGHT,* Circuit Judges

Appellees' Motion For Leave to File Second Petition For Rehearing and Suggestion For Rehearing En Banc is **DENIED.**

---

* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX E

McCarran-Ferguson Act, Relevant Provisions

15 U.S.C. § 1011.

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012.

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX F

Racketeer Influenced and Corrupt Organization Act. Relevant Provisions

18 U.S.C. § 1964.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX G

California Workers' Compensation Act, Relevant Provisions

§ 3201.

This division and Division 5 (commencing with Section 6300) are expression of the police power and are intended to make effective and apply to a complete system of workers' compensation the provisions of Section 4 of Article XIV of the California constitution.

* * *

§ 3602.

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

* * *

§ 3700.

Every employer except the state shall secure the payment of compensation in one or more the following ways:

(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this state.

* * *

§ 3753.

The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name, in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation.

* * *

§ 3755.

If the employer is insured against liability for compensation, and if after the suffering of any injury the insurer causes to be served upon any compensation claimant a notice that it has assumed and agreed to pay any compensation to the claimant for which the employer is liable, such employer shall be relieved from liability for compensation to such claimant upon the filing of a copy of such notice with the appeals board. the insurer shall, without further notice, be substituted in place of the employer in any proceeding theretofore or thereafter instituted by such claimant to recover such compensation, and the employer shall be dismissed therefrom.

Such proceedings shall not abate on account of such substitution but shall be continued against such insurer.

* * *

§ 4621.

(a) In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for his or her medical-legal expenses and reasonably, actually, and necessarily incurred, except as provided in Section 4064. The reasonableness of, and necessity for, incurring these expenses shall be determined with respect to the time when the expenses were actually incurred. Costs for medical evaluations, diagnostic tests, and interpreters' services incidental to the production of a medical report shall not be incurred earlier than the date of receipt of by the employer, the employer's insurance carrier, or, if represented, the attorney of record, of all reports and documents required by the administrative director incidental to the services. This subdivision is not applicable unless there has been compliance with Section 4620.

* * *

§ 4625.

(a) Notwithstanding subdivision (d) of Section 4628, all charges for medical-legal expenses for which the employer is liable that are not in excess of those set forth

in the official medical-legal fee schedule adopted pursuant to Section 5307.6 shall be paid promptly pursuant to Section 4622.

(b) If the employer contests the reasonableness of the charges it has paid, the employer may file a petition with the appeals board to obtain reimbursement of the charges from the physician that are considered to be unreasonable.

* * *

§ 4906.

(a) No charge, claim, or agreement for the legal services or disbursements mentioned in subdivision (a) of Section 4903, or for the expense mentioned in subdivision (b) of Section 4903, is enforceable, valid, or binding in excess of a reasonable amount. The appeals board may determine what constitutes a reasonable amount.

(b) No attorney or agent shall demand or accept any fee from an employee or dependent of an employee for the purpose of representing the employee or dependent of an employee in any proceeding of the division, appeals board, or any appellate procedure related thereto until the amount of the fee has been approved or set by the appeals board.

(c) Any fee agreement shall be submitted to the appeals board for approval within 10 days after the agreement is made.

(d) In establishing a reasonable attorney's fee, consideration shall be given to the responsibility assumed by

the attorney, the care exercised in representing the applicant, the time involved, and the results obtained.

* * *

§ 5300.

All the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4:

(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee, his or her dependents, or any third person.

(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this division.

(e) For obtaining any order which by Division 4 of the appeals board is authorized to make.

(f) For the determination of any other matter, jurisdiction over which is vested by Division 4 in the Division of Workers' Compensation, including the administrative director and the appeals board.

§ 5301.

The appeals board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division.

* * *

APPENDIX H

CALIFORNIA INSURANCE CODE, RELEVANT PROVISIONS

§ 1871.4.

(a) It is unlawful to do any of the following:

(1) Make or cause to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.

(2) Present or cause to be presented any knowingly false or fraudulent written or oral material statement in support of, or in opposition to, any claim for compensation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.

(3) Knowingly assist, abet, conspire with, or solicit any person in an unlawful act under this section.

(4) Make or cause to be made any knowingly false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim.

For the purposes of this subdivision, "statement" includes, but is not limited to, any notice, proof of injury, bill for services, payment for services, hospital or doctor records, X-ray, test results, medical-legal expense as defined in Section 4620 of the Labor Code, other evidence of loss, injury, or expense, or payment.

(b) Every person who violates subdivision (a) shall be punished by imprisonment in county jail for one year, or in the state prison, for two, three, or five years, or by a

fine not exceeding fifty thousand dollars ($50,000) or double the value of the fraud, whichever is greater, or by both imprisonment and fine. Restitution shall be ordered, including restitution for any medical evaluation or treatment services obtained or provided. The court shall determine the amount of restitution and the person or persons to whom the restitution shall be paid.

(c) Any person who violates subdivision (a) and who has a prior felony conviction of that subdivision, of former Section 556, of former Section 1871.1, or of Section 548 or 550 of the Penal Code, shall receive a two-year enhancement for each prior conviction in addition to the sentence provided in subdivision (b).

The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) This section shall not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction.

§ 1871.5.

Any person convicted of workers' compensation fraud pursuant to Section 1871.4 or Section 550 of the Penal Code shall be ineligible to receive or retain any compensation, as defined in Section 3207 of the Labor Code, where that compensation was owed or received as

a result of a violation of Section 1871.4 or Section 550 of the Penal Code for which the recipient of the compensation was convicted.

* * *

§ 1871.7.

(a) It is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to Division 4 (commencing with Section 3200) of the Labor Code or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer.

(b) Every person who violates any provision of this section or Section 549, 550, or 551 of the Penal Code shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000), plus an assessment of not more than three times the amount of each claim for compensation, as defined in Section 3207 of the Labor Code or pursuant to a contract of insurance. The court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment, or dissipation of illegal proceeds, or to protect the public.

(c) The penalties set forth in subdivision (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution

for the same conduct. If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the state for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive and would preclude, or be precluded by, a criminal prosecution, the court shall reduce that penalty appropriately.

(d) The Attorney General, district attorney, or commissioner may bring a civil action under this section. Before the commissioner may bring that action, the commissioner shall be required to present the evidence obtained to the appropriate local district attorney for possible criminal or civil filing. If the district attorney elects not to pursue the matter due to insufficient resources, then the commissioner may proceed with the action.

(e)(1) Any interested persons may bring a civil action for a violation of this section for the person and for the State of California. The action shall be brought in the name of the state. The action may be dismissed only if the court and the Attorney General, the district attorney, or the commissioner, whichever is participating, give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Attorney General, local

district attorney, or commissioner may elect to intervene and proceed with the action within 60 days after he or she receives both the complaint and the material evidence and information. If more than one governmental entity elects to intervene, the Attorney General shall have precedence, followed by the district attorney.

(3) The Attorney General, district attorney, or commissioner may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Attorney General, district attorney, or commissioner shall either:

(A) Proceed with the action, in which case the action shall be conducted by the Attorney General, district attorney, or commissioner.

(B) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person or governmental agency brings an action under this section, no person other than the Attorney General, district attorney, or commissioner may intervene or bring a related action based on the facts underlying the pending action unless that action is authorized by another statute or common law.

(f)(1) If the Attorney General, district attorney, or commissioner proceeds with the action, he or she shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. That person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Attorney General, district attorney, or commissioner may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Attorney General, district attorney, or commissioner of the filing of the motion, and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Attorney General, district attorney, or commissioner may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be held in camera.

(C) Upon a showing by the Attorney General, district attorney, or commissioner that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's, district attorney's, or commissioner's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including, but not limited to, the following:

(i) Limiting the number of witnesses the person may call.

(ii) Limiting the length of the testimony of those witnesses.

(iii) Limiting the person's cross-examination of witnesses.

(iv) Otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Attorney General, district attorney, or commissioner elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Attorney General, district attorney, or commissioner so requests, he or she shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts, at the Attorney General's, district attorney's, or commissioner's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Attorney General, district attorney, or commissioner to intervene at a later date upon a showing of good cause.

(4) If at any time both a civil action for penalties and equitable relief pursuant to this section and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level. The stay shall not preclude the court from granting or enforcing temporary equitable relief during the pendency of the actions. Whether or not the Attorney General, district attorney, or commissioner proceeds with the action, upon a showing by the Attorney General, district attorney, or commissioner that certain actions of discovery by the person initiating the action would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a period of not more than 180 days. A hearing on a request for the stay shall be conducted in camera. The court may extend the 180-day period upon a further showing in camera that the agency has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subdivision (e), the Attorney General, district attorney, or commissioner may elect to pursue its claim through any alternate remedy available to the Attorney General, district attorney, or commissioner.

(g)(1) If the Attorney General, district attorney, or commissioner proceeds with an action brought by a person under subdivision (e), that person shall, subject to the

second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Whether the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award those sums that it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(2) If the Attorney General, district attorney, or commissioner does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. Except as provided in this paragraph, the amount shall not be less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of the proceeds. If the person bringing the action has paid money to the defendant as a result of a violation

of this section, then he or she shall be entitled to up to double the amount paid to the defendant if that amount is greater than 30 percent of the proceeds. That person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(3) If a local district attorney has proceeded with an action under this section, one-half of the penalties not awarded to a private party, as well as any costs awarded shall go to the treasurer of the appropriate county. Those funds shall be used to investigate and prosecute fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the state and be deposited in the General Fund and, when appropriated by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.

(4) Whether or not the Attorney General, district attorney, or commissioner proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of this section, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the Attorney General, district attorney, or commissioner to continue the action on behalf of the state.

(5) If the Attorney General, district attorney, or commissioner does not proceed with the action, and the person bringing the action conducts the action, the court

may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h)(1) In no event may a person bring an action under subdivision (e) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the Attorney General, district attorney, or commissioner is already a party.

(2)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Attorney General, district attorney, or commissioner before filing an action under this section which is based on the information.

(i) Except as provided in subdivision (j), the Attorney General, district attorney, or commissioner is not liable for expenses that a person incurs in bringing an action under this section.

(j) In civil actions brought under this section in which the Attorney General, the Insurance Commissioner, or a district attorney is a party, the court shall retain discretion to impose sanctions otherwise allowed by law, including the ability to order a party to pay expenses as provided in Sections 128.5 and 1028.5 of the Code of Civil Procedure.

* * *

§ 1877.

This article shall be known and may be cited as the Workers' Compensation Insurance Fraud Reporting Act.

* * *

§ 1877.3.

(a) Upon written request to an insurer by an authorized governmental agency, an insurer, or agent authorized by that insurer to act on behalf of the insurer, shall release to the requesting authorized governmental agency any or all relevant information deemed important to the authorized governmental agency that the insurer may possess relating to any specific workers' compensation insurance fraud investigation.

(b)(1) When an insurer knows or reasonably believes it knows the identity of a person or entity whom it has reason to believe committed a fraudulent act relating to a workers' compensation insurance claim or a workers' compensation insurance policy, including any policy application, or has knowledge of such a fraudulent act that is reasonably believed not to have been reported

to an authorized governmental agency, then, for the purpose of notification and investigation, the insurer, or agent authorized by an insurer to act on its behalf, shall notify the local district attorney's office and the Bureau of Fraudulent Claims of the Department of Insurance, and may notify any other authorized governmental agency of that suspected fraud and provide any additional information in accordance with subdivision (a). The insurer shall state in its notice the basis of the suspected fraud.

* * *

APPENDIX I

REPORTER'S TRANSCRIPT, EXCERPT

* * *

[p. 14] MR. RAPPAPORT: YOUR HONOR, THE PROBLEM IS THAT THE DAMAGES WHICH HAVE BEEN SUFFERED BY ZENITH INSURANCE COMPANY ARE THE DAMAGES WHICH THEY HAVE TO INCUR AS AN INSURER IN INVESTIGATING AND DEFENDING AGAINST CLAIMS.

THE COURT: THAT'S PART OF THE JOB. THAT'S PART OF THE BUSINESS OF INSURANCE, INVESTIGATION OF FRAUDS.

MR. RAPPAPORT: WHEN A FRAUDULENT LIEN IS SUBMITTED, ZENITH – THE BEST IT COULD DO IS TO DEFEAT THE FRAUDULENT LIEN. IT IS DAMAGED IN DOING SO AND THERE'S NO RECOMPENSE BEFORE THE WORKERS COMPENSATION APPEALS BOARD.

* * *

Supreme Court, U.S.
FILED
MAY 5 1997
CLERK

No. 96-1329

In The

Supreme Court of the United States

October Term, 1996

MICHAEL LIGHTMAN, an individual, *et al.*,

Petitioners,

vs.

ZENITH INSURANCE COMPANY, a California corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in holding that Respondent's RICO claims are not preempted by California law under the McCarran-Ferguson Act.

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Respondent Zenith Insurance Company respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Ninth Circuit Court of Appeals in this case. The opinion of the Ninth Circuit Court of Appeals is unreported and is reprinted as Appendix A to the petition.

STATEMENT OF THE CASE

A. Facts Material To The Consideration Of The Question Presented.

Petitioners' Statement of the Case attempts to minimize their roles in the conduct of the affairs of an association-in-fact RICO enterprise, and the nature and scope of their conspiracy and pattern of racketeering activity, by describing Respondent's Complaint as one "to recover alleged overpayments it made on 45 workers' compensation claims" due to "fraudulent billings."

As described in Respondent's Complaint (E.R. 1)[1] and RICO Case Statement (E.R. 9 and 10), Petitioners conspired together and operated and conducted a RICO enterprise to commit mail fraud through the creation, submission to Respondent and prosecution of fraudulent claims for workers' compensation benefits and related bills and requests for liens for medical and legal services purportedly rendered to workers.

The association-in-fact enterprise, comprised of Petitioners James W. Eisenberg Medical Corporation, Robert Yale Libott, a law corporation, Excalibur Ventures, Inc. and Lien Collections, Inc. operated to attract workers to file claims against their

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1. "E.R. 1" refers to Exhibit 1 of the consecutively numbered exhibits in the Excerpts of Record on Appeal filed with the court below. Where appropriate, page citations are included after exhibit numbers.

employers and to fraudulently inflate the claims and related bills and requests for liens for medical and legal services purportedly rendered. Workers were unlawfully solicited from unemployment lines and through media ads. Workers who responded to the solicitation were induced to file claims regardless of whether the workers had legitimate injuries. The workers also were sent for treatment and medical-legal evaluation and referred to an affiliate for CT scans, MRIs and other diagnostic studies. Petitioners Michael Lightman and Excalibur Ventures, Inc. managed the daily operations of the medical clinics and law offices and mailed to Respondent, as the insurer for the workers' employers, claims by the workers and bills and lien requests for medical and legal services. Petitioner Lien Collections, Inc. prosecuted and collected the bills and lien requests. (E.R. 9, p. 521, l. 17 – p. 528, l. 2).

Petitioners' fraudulent inflation and exaggeration of claims, bills and lien requests occurred in several ways. Petitioners deliberately and fraudulently abused the Relative Value Scale codes established in California's Official Medical Fee Schedule to misrepresent to Respondent the nature, extent and value of medical services provided to workers and thereby inflate medical bills and lien requests.

Other schemes used by Petitioners to defraud Respondent included: (i) increasing bills to pay physicians unlawful kickbacks for prescribing unnecessary treatment (E.R. 9, p. 513, l. 1 – p. 515, l. 14); (ii) inflating bills and liens to disguise the payment of illegal kickbacks and referral fees (E.R. 9, p. 515, l. 16 – p. 516, l. 28); (iii) misrepresenting that services were medical-legal and thereby substantially inflating the amount billed for the services (E.R. 9, p. 517, l.4 – p. 518, l. 15); (iv) misrepresenting that a physician was a "treating physician" (E.R. 9, p. 518, l. 17 – p. 519, l. 11); and (v) inducing workers who did not have industrial injuries to file fraudulent workers'

compensation claims and billing for medical and medical-legal services to the worker (E.R. 9, p. 519, l. 13 – p. 521, l. 15).

B. Course Of Proceedings And Disposition Of The Case Below.

On June 14, 1994, after staying the action for more than one year during which, at the District Court's direction, the parties briefed such issues as the constitutionality and status of civil RICO, abstention and the McCarran-Ferguson Act, the District Court dismissed Respondent's RICO claims. (E.R. 24, p. 1051). The basis for the dismissal was the District Court's belief that mail fraud against an insurer constitutes the "business of insurance" and therefore is preempted by the McCarran-Ferguson Act. (E.R. 24, p. 1051).

In reversing the judgment of dismissal, the court below did not reach three of the four prongs of the test for determining whether the McCarran-Ferguson Act preempts a federal statute. Rather, finding that "[t]his case is squarely controlled by" *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 418, 133 L. Ed. 2d 335 (1995), the court below held that Respondent's RICO claims do not meet the fourth prong of the McCarran-Ferguson Act because RICO does not invalidate, impair or supersede California law "proscribing identical conduct" even if RICO and the state law do not provide the same remedies.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE MISSTATED CALIFORNIA LAW IN AN EFFORT TO MANUFACTURE THE APPEARANCE OF A CONFLICT WITH THE COURT BELOW'S DECISION.

The principal reason advocated by Petitioners as the basis for granting certiorari, the purported conflict between the decision of the court below and California law, has been manufactured by Petitioners through their gross misstatement of California law relating to the nature and scope of the exclusive jurisdiction of the Workers' Compensation Appeals Board (the "WCAB").

The petition is founded upon the premise that California law vests the WCAB with exclusive jurisdiction over all tort claims by an insurer relating to workers' compensation fraud. This premise is false. Subject to various exceptions, California's legislature has conferred upon the WCAB exclusive jurisdiction over claims *against* an insurer "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." However, the converse is not true. There is no exclusive jurisdiction over clams by an insurer against persons like the Petitioners in this case. Cal. Lab. Code §§ 5300, 5302 and 5304; *Shoemaker v. Myers*, 52 Cal. 3d 1, 13-17, 801 P.2d 1054, 1060-63, 276 Cal. Rptr. 303 (1990); *Marsh & McLennan, Inc. v. Superior Court*, 49 Cal. 3d 1, 10-11, 774 P.2d 762, 259 Cal. Rptr. 733 (1989); *Mitchell v. Scott Wetzel Services, Inc.*, 227 Cal. App. 3d 1474, 1479, 1482, 278 Cal. Rptr. 474, 476, 478-79 (1991); *Stoddard v. Western Employers Ins. Co.*, 200 Cal. App. 3d 165, 171-72, 245 Cal. Rptr. 820, 823-25 (1988), *review den.*, (1988) *Santiago v. Employee Benefits Services*, 168 Cal. App. 3d 898, 214 Cal. Rptr. 679 (1985).

The fallacy of Petitioners' premise is apparent from the fact that, with one exception, the cases cited in support of their argument address whether the WCAB has exclusive jurisdiction over claims *against* an insurer. *See Marsh & McLennan, Inc. v. Superior Court*, 49 Cal. 3d at 5, 774 Cal. Rptr. at 763 (worker sued insurer for fraud, intentional infliction of emotional distress and breach of fiduciary duties with respect to claim for benefits); *Unruh v. Truck Ins. Exchange*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (worker sued insurer for intentional infliction of emotional distress in retaining investigator who began romantic relationship as a ruse to investigate her claim); *Mitchell v. Scott Wetzel Services, Inc.*, 227 Cal. App. 3d at 1479 and 1482, 278 Cal. Rptr. at 476 and 478-79 (worker sued insurer for alleged misrepresentations and perjury before the WCAB); *Everfield v. State Comp. Ins. Fund*, 115 Cal. App. 3d 15, 21, 171 Cal. Rptr. 164, 166 (1981) (worker sued insurer for alleged fraudulent, deceitful and intentional refusal to pay benefits).[2]

Petitioners cite only a single *non-RICO* case suggesting that the WCAB has exclusive jurisdiction over common law fraud claims against *physicians* (but *not* attorneys, management companies or collection services),[3] *American International Adjustment Co., Inc. v. Crawford*, 51 Cal. App. 4th 1489, 60

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2. Contrary to Petitioners' description of *American Psychometric Consultants, Inc. v. Workers' Compensation Appeals Bd.*, 36 Cal. App. 4th 1626, 43 Cal. Rptr. 2d 254 (1995), *reh'g denied, review denied,* (1995), as a case which "addressed the issue of whether the type of relief sought by Zenith herein could be claimed apart from California's workers' compensation system" (Petition at p. 9), the opinion examined and reversed decisions by the WCAB.

3. Generally, attorneys, managers and collection services such as Petitioners are strangers to the presumed compensation bargain underlying the Workers' Compensation Act and the exclusive jurisdiction doctrine. *Shoemaker v. Myers*, 52 Cal. 3d at 15-16, 801 P.2d at 1062-63.

Cal. Rptr. 2d 123 (1997), *reh'g denied, review granted,* 97 Daily Journal D.A.R. 5576 (April 30, 1997) (S059135). However, on April 30, 1997, the California Supreme Court granted review in *American International Adjustment Co., Inc. v. Crawford,* 51 Cal. App. 4th 1489, 60 Cal. Rptr. 2d 123, and vacated the Court of Appeal decision. Thus, Petitioners cannot cite even this one opinion.

Nor does the decision of the court below create a conflict with *American International Group, Inc. v. Superior Court,* 234 Cal. App. 3d 749, 767-68, 285 Cal. Rptr. 765, 776-77 (1991), *reh'g denied, review denied,* (1991), which would justify granting certiorari.

In *American International Group, Inc.* a California Court of Appeal found McCarran-Ferguson preemption on the theory that RICO would circumvent recent California Supreme Court holdings rejecting an insurer's liability to third-parties under Insurance Code § 790.03(h). *American International Group, Inc. v. Superior Court,* 234 Cal. App. 3d at 767-68, 285 Cal. Rptr. at 776-77. Unlike *American International Group, Inc.*, in this case RICO confers equal liability for conduct also proscribed by state law; the difference between federal and state law lies in the remedies available for their violation.

Moreover, the issue later determined in *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 418, 133 L. Ed. 2d 335 (1995), and applied by the court below, "the question of exactly when a federal statute 'invalidate[s], impair[s] or supersede[s]' a state law under § 2(b)" of the McCarran-Ferguson Act, is purely a question of federal law to be determined by federal, rather than state, courts. To the extent that the California Court of Appeal in *American International Group, Inc. v. Superior Court,* 234 Cal. App. 3d 749, opined on what then was

an open question of federal law in the Ninth Circuit, *American International Group, Inc.* has been superseded by *Merchants Home Delivery Serv., Inc.*, 50 F.3d 1486. There is no California opinion subsequent to *Merchants Home Delivery Serv., Inc.*, 50 F.3d 1486, suggesting that California's appellate courts will not follow *Merchants Home Delivery Serv., Inc.'s* holding that RICO is not preempted by state law.

Petitioners' claim of a conflict between the court below's decision and California law, like their prediction that the decision will generate a forum shopping frenzy by insurers which threatens the fabric of the workers' compensation system, is a fallacy. There is not a single California case holding that a RICO claim by an insurer against physicians, attorneys, their managers or collection services is within the exclusive jurisdiction of the WCAB. Nor is there a single California case holding that such a RICO claim would not fall within one or more of the various recognized exceptions to the WCAB's exclusive jurisdiction. The petition is founded upon a false premise and should be denied.

II.

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE APPLICATION OF THE McCARRAN-FERGUSON ACT BY OTHER UNITED STATES COURTS OF APPEALS.

Petitioners also attempt to manufacture the appearance of a conflict between the decision of the court below and the decisions of other United States Courts of Appeals over when a federal statute invalidates, impairs or supersedes a state law under the McCarran-Ferguson Act. Petitioners reflexively cry conflict merely because another court found that RICO was preempted by state law. The obvious flaw with Petitioners'

simplistic approach is that it ignores the extremely fact intensive inquiry required to determine whether a specific state statute would be invalidated, impaired or superseded by the application of RICO.

In finding Respondent's RICO claims are not subject to McCarran-Ferguson preemption, the court below ruled that "[t]his case is squarely controlled by" its holding in *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d at 1492, that a federal law providing for a private right of action does not "invalidate, impair or supersede" state law when it prohibits acts which also are prohibited under state insurance law even if it affords remedies not available under that state law. *See also Forsyth v. Humana, Inc.*, 99 F.3d 1504, 1516 (9th Cir. 1996).

The court below's application of the "invalidate, impair or supersede" prong of the McCarran-Ferguson Act in this case, *Forsyth v. Humana, Inc.*, 99 F. 3d 1504, and *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, is consistent with decisions by the Eighth Circuit in *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, 292 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3572 (U.S. February 10, 1997) (No. 96-1252), the First Circuit in *Villafane-Neriz v. F.D.I.C.*, 75 F.3d 727, 735-36 (1st Cir. 1996), *amended, reh'g denied*, (1996), the Sixth Circuit in *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), *reh'g, en banc, denied*, (1995), *mot. granted, cert. denied*, (1996), the Seventh Circuit in *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 294-95 (7th Cir. 1992), *reh'g, en banc, denied*, (1992), *cert. denied*, 508 U.S. 907, 113 S. Ct. 2335, 124 L. Ed. 247 (1993), and the Fourth Circuit in *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 420-21 (4th Cir. 1984).

The only appellate opinion cited by Petitioners which even

arguably is in conflict with the decision of the court below is *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996), *reh'g, en banc, denied,* (1996) and *reh'g, en banc, denied,* (1996).[4] Close examination of *Kenty* shows that the purported conflict is entirely illusory.

Kenty, 92 F.3d 384, examined an order granting summary judgment in favor of defendants on a RICO claim alleging mail fraud in the defendant bank's requirement that borrowers purchase casualty insurance issued by the defendant insurer as a prerequisite to the bank granting car loans. The Sixth Circuit affirmed, finding that the plaintiffs had failed to provide evidence of a material false statement sufficient to raise a triable issue of fact. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d at 391.

In *dicta*, the *Kenty* court also found that the RICO claim was preempted under the McCarran-Ferguson Act because it would *substantively* impair or supersede Ohio law by creating federal liability for conduct which, under several specific Ohio insurance statutes, would not give rise to liability:

> By holding insurance companies liable under a federal law, such as RICO, when Ohio law

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4. Petitioners' argument that the decision of the court below conflicts with earlier District Court opinions is frivolous. *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, represents the first time that the court below addressed "the question of exactly when a federal statute 'invalidate[s], impair[s] or supersede[s] a state law' " under the McCarran-Ferguson Act. 50 F.3d at 1492. The fact that a District Court came to the opposite conclusion before the court below considered the issue obviously does not create a conflict. Similarly, the Eastern District of Virginia opinion cited by Petitioners, *Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd without op.*, 95 F.3d 41 (4th Cir. 1996), does not create a conflict. The controlling Fourth Circuit opinion, *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 420-21, is consistent with the court below's decision.

> provides for no liability, RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business.

Kenty v. Bank One, Columbus, N.A., 92 F.3d at 392.

Petitioners' inaccurate characterization of *Kenty*'s *dicta* as conflicting with the decision below ignores the steps taken by the Sixth Circuit to limit the opinion to the specific facts before it. In limiting *Kenty* to the factual scenario in which RICO *substantively* impairs or supersedes several specific statutes by employing different standards of liability and proof, the Sixth Circuit carefully reaffirmed and distinguished its previous decision in *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351, that "allowing additional procedural means, such as jury trials or punitive damages, could not be said to be impairing or superseding" state law which afforded only administrative remedies and did not allow a private right of action. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d at 392. Significantly, in reaching its decision in *Nationwide Mutual Ins. Co.*, the Sixth Circuit approved and relied upon the holding in *Merchants Home Delivery Serv., Inc.*; *American Family Mut. Ins. Co.* and *Mackey*, that "the presence of additional remedies in the" federal law being examined does not cause the federal law "to invalidate, impair or supersede [state] insurance law." *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d at 1363.

The court below's decision does not conflict with *Kenty* because in this case RICO confers equal liability for conduct also proscribed by state law. As in *Nationwide Mutual Ins. Co.*, any difference between RICO and California law lies in the available remedies for their violation.[5] *Kenty* recognizes that

5. The WCAB is empowered to order physicians to make restitution (Cont'd)

such differences in remedies are "additional procedural means" which "could not be said to be impairing or superseding" state law. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d at 392.

Similarly, the decision below does not conflict with a recent case not cited by Petitioners, *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1306-08 (8th Cir. 1997). In holding that applying RICO would so substantively affect the specific Minnesota statutes being examined that RICO "would frustrate, and perhaps even supplant" them, the Eighth Circuit in *Doe* distinguished *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, as involving, as does this action, laws "designed to protect parties other than the policyholders." 107 F.3d at 1308, n. 11. Unlike Petitioners, the Eighth Circuit recognized that simply because RICO may invalidate, impair or supersede a particular state insurance law under one specific set of facts does not mean that RICO necessarily would be found to invalidate, impair or supersede another state insurance law under a different set of facts.

To the extent that there may be tension between the Eighth Circuit's decision in *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, and the Ninth Circuit's decisions in *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, and *Forsyth v. Humana, Inc.*, 99 F.3d 1504, such tension does not extend to the decision below. Unlike the scenario presented in *Doe*, 107 F.3d at 1306, in which the conduct attributed to the

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(Cont'd)
and to impose equitable relief for fraud. *American Psychometric Consultants, Inc. v. Workers' Compensation Appeals Bd.*, 36 Cal. App. 4th at 1646, 43 Cal. Rptr. 2d at 254. As discussed above, there is no California case which would preclude fraud based claims against physicians by a workers' compensation insurer and no California case at all which would preclude such claims against attorneys, medical and legal managers or lien collection services. Insurance Code § 1871.7 provides a qui tam private right of action for civil penalties for insurance fraud.

defendant bank fell "squarely within several sections of Minnesota's insurance law," most of the Petitioners here are attorneys, managers and collectors who are outside of the workers' compensation system. At least as to those Petitioners, *there is no California insurance statute which could be affected by the RICO claim.* Nor is there any California decision which would preclude Respondent from pursuing a state fraud based claim against them. Thus, the decision below does not create conflict with any United States Court of Appeals which would justify granting certiorari.

Moreover, even if any tension exists between *Doe* and *Merchants Home Delivery Serv., Inc.* and *Forsyth*, the petition should be denied because the court below correctly applied the McCarran-Ferguson Act's "invalidate, impair or supersede" prong. Interpreting the "invalidate, impair or supersede" prong as Petitioners urge would result in the application of different standards to principles governing state preemption of federal law under the McCarran-Ferguson Act than are applied to principles governing federal preemption of state law. *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d at 1492; *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d at 296.

As observed by the court below in approving the Seventh Circuit's reasoning in *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d at 296:

> In reaching its conclusion, the Seventh Circuit analogized to the principles governing *federal* preemption of *state* law in areas heavily regulated by federal statute. For example, in the area of nuclear power, despite pervasive federal regulation and a lower cap on liability under federal law, the

> Supreme Court upheld a state punitive damages award for acts prohibited by both state and federal law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 624, 78 L. Ed. 2d 443 (1984). The Seventh Circuit went on to catalog many additional Supreme Court cases upholding cumulative state *remedies* for conduct deemed wrongful under both state and federal law.

Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d at 1492.

The decision below was correctly decided and does not conflict with the decision of any United States Court of Appeal. Accordingly, the petition should be denied.

III.

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW WOULD BE AN INAPPROPRIATE VEHICLE FOR REVIEWING ANY PURPORTED DIFFERENCES IN THE APPLICATION OF THE McCARRAN-FERGUSON ACT.

There are at least two additional significant reasons why the court below's decision would be an inappropriate vehicle for reviewing any purported differences in the interpretation or application of the "invalidate, impair or supersede" prong of the McCarran-Ferguson Act.

Whether the court below properly applied the McCarran-Ferguson Act's "invalidate, impair or supersede" prong in reversing the District Court judgment obviously is irrelevant if

Respondent's RICO claims would not fall within the WCAB's exclusive jurisdiction under California law. There is not a single California case holding that a RICO claim by an insurer against physicians, attorneys, their managers or collection services is within the exclusive jurisdiction of the WCAB. Nor is there a single California case holding that such a RICO claim would not fall within one or more of the various recognized exceptions to the WCAB's exclusive jurisdiction. The idiosyncracies of California's workers' compensation scheme make this case an inappropriate vehicle to address the general question of the degree to which insurance law preempts RICO under the McCarran-Ferguson Act.

Second, independently of whether the court below applied the proper test for whether the RICO claims would invalidate, impair or supersede California law, the decision below reached the correct result because Petitioners did not satisfy another of the McCarran-Ferguson Act's four prongs.

A claim is subject to preemption only if all four prongs of the McCarran-Ferguson Act are met. *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-61 (1969); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d at 1489. Contrary to Petitioner's mischaracterization (Petition at p. 14), the court below did not consider or determine whether any of the other three prongs had been met. Finding that, under the controlling authority of *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, the RICO claims would not invalidate, impair or supersede California law, the court below did not go further in its inquiry.

It is apparent that Petitioners also did not meet their burden with respect to at least one other prong as the fraudulent conduct underlying Respondent's RICO claims does not constitute the "business of insurance" within the meaning of the McCarran-

Ferguson Act. A district court must analyze three factors to determine whether activity constitutes the business of insurance:

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *Serrato v. John Hancock Life Ins.*, 31 F.3d 882, 885 (9th Cir. 1994); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 560 (9th Cir. 1994).

Under this analysis, activities involving the relationship between the insurer and policyholder and affecting whether the policyholder would receive the benefits of performance of the insurance contract have been found to constitute the "business of insurance." *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 501 (1993) (the liquidation of an insurer and distribution of assets to policyholders); *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826-27 (N.D. Cal. 1992) (the use of fraudulent financial statements to induce agents to sell insurance policies.)

Conversely, activities which are not an integral part of the policy relationship between insurer and insured or which occur outside the insurance industry have been held not to constitute the "business of insurance." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 48, (holding that bad faith by an insurer is not the "business of insurance"); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. at 129 (holding that the use of a peer review committee

to advise an insurer as to whether charges for chiropractic services were reasonable and necessary is not part of the "business of insurance"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 213-14 (1979), *reh'g denied*, 441 U.S. 917 (1979) (holding that an insurer's agreement with participating pharmacies to provide benefits to policyholders was not part of the "business of insurance"); *Thacker v. New York Life Ins. Co.*, 796 F. Supp. 1338, 1342 (E.D. Cal. 1992) (holding that mail fraud in violation of federal RICO laws "deals not with the business of insurance, but with conduct wholly divorced from what is ordinarily viewed as 'the business of insurance' ".)

Applying this tripartite test, the conduct by Petitioners which gives rise to the RICO claims clearly does not constitute the "business of insurance." Mail fraud does not transfer or spread a policyholder's risk. Petitioners are not policyholders; they are strangers to the policy who have chosen Respondent and its insureds as their victim. The risk against which Respondent's policyholders have insured is injury or illness to their employees in the workplace, not mail fraud. The submission and prosecution of fraudulent claims and related medical and legal bills and requests for liens does not transfer or spread the risk to employers of injury or illness to their employees. Rather, such a pattern of racketeering injures Respondent's business and property.

Mail fraud is not an integral part of the policy relationship between the insurer and the insured. It is a criminal aberration which victimizes both the insurer and the insured. *Thacker v. New York Life Ins. Co.*, 796 F. Supp. at 1342, therefore is controlling. Just as arson is not an integral part of the relationship between a property and casualty insurer and its policyholder and bank robbery is not an integral part of the relationship between a bank and its depositor, mail fraud in violation of the

RICO laws "deals not with the business of insurance, but with conduct wholly divorced from what is ordinarily viewed as 'the business of insurance.' "

Examination of the third factor, whether the practice is limited to entities within the insurance industry, also compels the conclusion that the alleged mail fraud does not constitute the "business of insurance." Petitioners are not in the insurance industry. They are a doctor, his medical corporation, a lawyer, his law corporation, the administrator of the medical and law corporations and his two companies. Mail fraud generally is not limited to the insurance industry. Moreover, the victims who are insured by Respondent also are not "within the insurance industry;" they are engaged in a wide range of activities, including restaurants, electrical contractors, dentists, beauty suppliers, yacht clubs, automobile dealerships, hotels and manufacturers.

The fact that one victim, Respondent, transacts insurance business does not insulate Petitioners from civil liability for their RICO violations. As the court below observed in *United States v. Title Ins. Rating Bureau, Inc.*, 700 F.2d 1247, 1249-50 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984), the McCarran-Ferguson act is to be narrowly construed and "exempts the 'business of insurance' and not the 'business of insurance companies.' "

The court below's decision would be an inappropriate vehicle for reviewing any purported differences in the interpretation or application of the "invalidate, impair or supersede" prong of the McCarran-Ferguson Act. Whether the court below properly interpreted the "invalidate, impair or supersede" prong is irrelevant since: (i) under California law, Respondent's RICO claims would not be precluded by the WCAB's exclusive jurisdiction; and (ii) Petitioners did not

satisfy the "business of insurance" prong. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

October Term, 1996

MICHAEL J. LIGHTMAN, et al.,

Petitioners,

v.

ZENITH INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF AND REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In view of *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997), which was decided after petitioners filed their petition for a writ of certiorari, petitioners submit the following additional question so as to better focus the national implications of the question presented:

> Whether a federal statute which prohibits conduct that is also prohibited by state insurance law invalidates, impairs or supersedes that state insurance law under the McCarran-Ferguson Act because of a difference in the availability and the magnitude of the remedies that the federal statute provides.

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I.

THE CALIFORNIA SUPREME COURT'S GRANTING OF PETITIONS FOR REVIEW IN *AMERICAN INTERNATIONAL ADJUSTMENT CO., INC. V. CRAWFORD* DOES NOT PRECLUDE THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

On April 30, 1997 the California Supreme Court granted petitions for review in the case of *American International Adjustment Co., Inc. v. Crawford*, 51 Cal.App.4th 1489 [60 Cal.Rptr.2d 123] (1997). (Appendix A). Despite that granting of review, the petition for a writ of certiorari should still be granted for the following reasons:

1. There is a conflict among federal courts as to the applicability of the McCarran-Ferguson Act to RICO suits which involve the business of insurance. See sections II and III of the petition for writ of certiorari and section II herein.

2. Since RICO is not involved in *Crawford*, it is unlikely that any opinion by the California Supreme Court will impact *American International Group, Inc. v. Superior Court*, 234 Cal.App.3d 749 [285 Cal.Rptr. 765] (1991), *cert. denied*, 504 U.S. 911 [112 S. Ct. 1994, 118 L. Ed. 2d 549](1992), wherein the California court of appeal held that application of RICO to California's workers' compensation system would invalidate, impair or supersede that system.

3. As shown in Appendix A, *Crawford's* review may be limited to the propriety of the sanctions awarded therein.

II.

THERE IS A REAL CONFLICT AMONG FEDERAL COURTS OVER WHETHER ALLOWING RICO SUITS IN AREAS REGULATED BY STATE INSURANCE LAW INVALIDATES, IMPAIRS, OR SUPERSEDES SUCH STATE INSURANCE LAW.

Any doubt over the existence of a conflict among the circuits with respect to whether allowing a RICO suit in an area highly regulated by state insurance law would invalidate, impair or supersede such state law has been put to rest by the recent decision in *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997), which was decided after petitioners filed their petition. As stated by the court:

> Several courts addressing this question have concluded that the McCarran-Ferguson Act is not implicated by federal law that is substantively parallel to state law. *See Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996) (Federal Deposit Insurance Act); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (Fair Housing Act), *cert. denied*, ___U.S.___, 116 S.Ct. 973, 133 L.Ed.2d 893 (1996); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.) (RICO), *cert. denied*, ___ U.S. ___, 116 S.Ct. 418, 133 L.Ed.2d 335 (1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992) (Fair Housing Act), *cert. denied*, 508 U.S. 907, 113 S.Ct. 2335, 124 L.Ed.2d 247 (1993); *Thacker v. New York Life Ins. Co.*, 796 F.Supp. 1338, 1342-43 (E.D.Cal. 1992) (RICO). Other courts have disagreed, concluding that the intrusion of RICO's substantial damage provisions into a state's insurance regulatory program may so impair the state law as to

> bar the application of RICO. *See Kenty*, 92 F.3d at 392; (collateral protection insurance case; distinguishing *Nationwide*); *Ambrose v. Blue Cross & Blue Shield*, 898 F.Supp. 1153, 1165-68 (E.D.Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996) (unpublished per curiam); *Everson v. Blue Cross & Blue Shield*, 898 F.Supp. 532, 544 (N.D.Ohio 1994); *Wexco Inc. v. IMC, Inc.*, 820 F.Supp. 194, 203-04; *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F.Supp. 820, 829 (N.D.Cal. 1992); *Senich v. Transamerica Premier Ins. Co.*, 766 F.Supp. 339, 341-42 (W.D.Pa. 1990) (collateral protection insurance case).

Id. at 1307.

Respondent seeks to avoid this obvious conflict by contending that every case which holds that use of a federal statute would invalidate, impair or supersede state law must be limited to its specific facts, and that absolutely no principles of law are to be gleaned therefrom. No authority for such limiting interpretation is provided. That is because none exists.

It should also be noted that every case cited above in *Doe* was decided in the 1990s. This shows the timeliness of the issue. As for the issue itself, the court in *Doe* stated:

> The precise degree of impairment of a state statute that is required to trigger the operation of the McCarran-Ferguson Act is not settled. . . . The issue presented here, therefore, is whether a federal statute that is essentially parallel in substance to a state statute may impair the state statute because of a difference in the availability and the magnitude of the remedies they provide.

Id. at 1307.

That issue is now ripe for resolution by the Court.

III.

RESPONDENT'S INTERPRETATION OF CALIFORNIA LAW IS FUNDAMENTALLY FLAWED BECAUSE IT WOULD ALLOW INSURERS TO BRING RICO SUITS AGAINST PERSONS PARTICIPATING IN CALIFORNIA'S WORKERS' COMPENSATION SYSTEM, BUT PRECLUDE THESE SAME PERSONS FROM BRINGING RICO SUITS AGAINST INSURERS.

Seeking to limit the purport of California legislation and case law which confines disputes over the propriety of claims, bills and liens generated within the California workers' compensation system to the Workers' Compensation Appeals Board ("WCAB"), respondent argues that California law only prohibits insurers within that system from being sued for their tortious conduct. However, according to respondent, nothing in California law precludes insurers from suing everyone else in the California workers' compensation system for their alleged tortious conduct.

Suffice it to say that not one statutory provision or judicial decision in California has come close to stating that mutuality of remedy is dead or non-existent in California in this context. Indeed, why would California even consider exempting only insurers in California's workers' compensation system from suit, but no one else who functions within that system? Respondent offers no explanation. Respondent's argument about California law is simply erroneous.

So too is respondent's argument that only the medical provider petitioners are within the ambit of California's workers' compensation system. In fact, all petitioners are regulated by and within the scope of California's workers' compensation system. *Independence Indem. Co. v. Industrial Acc. Com.*, 2 Cal. 2d 397 [41 P.2d 320] (1935). The provisions of California's Workers' Compensation Act, Cal. Lab. Code §§ 3201, *et seq.*, Appendix G to Petition for Writ of Certiorari, and Insurance Code provisions related thereto, Cal. Ins. Code §§ 1871.4, 1871.5, 1871.7 and 1877, *et seq.*, Appendix H to Petition for Writ of Certiorari, clearly apply to all petitioners. Respondent has no authority that contradicts this point.

IV.

THE FACT THAT THIS CASE INVOLVES WORKERS' COMPENSATION MAKES IT MOST APPROPRIATE FOR REVIEW.

Respondent suggests that "the idiosyncrasies of California's workers' compensation system scheme makes this case an inappropriate vehicle to address the general question of the degree to which insurance law preempts RICO pursuant to the McCarran-Ferguson Act." Respondent's Brief in Opposition at 14. With all due respect, it is precisely the "idiosyncrasies" of California's and other state's workers' compensation systems which makes this case appropriate for review.

Petitioners are not here concerned with any "general question" of how insurance law preempts RICO under McCarran-Ferguson. Rather, petitioners are concerned about whether, in view of McCarran-Ferguson, allowing a

federal RICO remedy will invalidate, impair or supersede California's workers' compensation system. That is a question of nationwide importance and, for the sake of the "transactional stability" necessary for a state's workers' compensation system, one that should be resolved by the Court. Otherwise, federal courts could become federal Workers' Compensation Appeals Boards, operating under a RICO umbrella, and forced to learn and apply the very "idiosyncrasies of [a state's] workers' compensation system scheme" that respondent argues makes this case inappropriate for review.

V.

NO ISSUE EXISTS CONCERNING THE "BUSINESS OF INSURANCE," OR PETITIONERS' ALLEGED CONDUCT.

In what can only be characterized as a desperate attempt to prevent the granting of certiorari, respondent spends about a fourth of its opposition discussing a non-issue, namely the "business of insurance." Respondent's Brief in Opposition at 14-18. Acknowledging that the court below never discussed this issue in its opinion, respondent nevertheless asks the Court to consider this issue as a basis for denying certiorari.

To begin with, it is well established that the Court does not consider initially an issue not first considered by the court below. *See Hudson v. McMillian*, 503 U.S. 1, 12 [112 S.Ct. 995, 1002, 117 L.Ed.2d 156] (1992). At best, if the issue is deemed important, the Court should remand the issue for consideration by the court below. Second, petitioners have not discussed the "business of insurance"

issue in their petition because it was a non-issue in the opinion of the court below. The issue, however, was raised in the court below. To the extent the Court has any interest in this issue, a copy of the portion of petitioner's brief in the court below which discussed it is attached as Appendix B. As can be seen, respondent is in error on this issue as well.

Finally, respondent's recitation of "Facts Material to the Consideration of the Question Presented" at pages 1-3 of Respondent's Brief in Opposition represents respondent's continuing efforts to elevate its *unproven allegations* to the level of proven facts. In the context of the jurisdictional issues raised by petitioners, these *unproven allegations* are irrelevant. Respondent's only purpose in mentioning these *unproven allegations* is to hopefully color the Court's attitude against petitioners because respondent has no substantive opposition to the jurisdictional issues raised by petitioners.

CONCLUSION

For the reasons stated above, and in their petition for a writ of certiorari, petitioners request that their petition be granted.

Respectfully submitted,

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APPENDIX A

ORDER

Cite as 97 Daily Journal D.A.R. 5576

AMERICAN INTERNATIONAL ADJUSTMENT CO.,
Appellant

v.

BYRON CRAWFORD,
Respondent.

C.A. 4th, Div. 3, No. G015835
No. S059135
California Supreme Court
Filed April 30, 1997

Petitions for review GRANTED.

George, Chief Justice
Mosk, Associate Justice
Kennard, Associates Justice
Baxter, Associate Justice
Werdegar, Associate Justice
Chin, Associate Justice
Brown, Associate Justice

(**Editor Note** – For your convenience we reprint below the **Daily Journal's** Ruling Column brief which summarized the earlier decision of the lower court.)

WORKERS' COMPENSATION

Workers' Compensation Insurer Isn't Sanctionable for Filing Tort Action and Administrative Complaint for Same Alleged Fraud.

The *C.A. 4th* has found that although workers' compensation was the exclusive remedy for fraudulent billing allegations, sanctions were unwarranted for also filing a similarly-based tort complaint.

American International Adjustment Corp., a workers' compensation insurer, filed a complaint against Professional Consultation Services and four other Los Angeles medical clinics allegedly owned by Byran Crawford, a doctor. The complaint generally asserted that there were double billings, unrendered or unauthorized medical services, fraudulent diagnoses and premature medical-legal evaluations in 158 separate workers' compensation claims. American sought compensatory and punitive damages and injunctive relief. American also filed a petition with the Workers' Compensation Appeals Board (WCAB) seeking restitution of the same $519,369. Professional claimed that the WCAB had exclusive jurisdiction. The trial court treated Professional's response as a demurrer and, on its own motion, amended the response to request sanctions, without stating specific grounds. The trial court sustained the demurrers without leave to amend based on the WCAB's exclusive jurisdiction. It declined to hear oral arguments as to the sanctions and imposed $60,000 in sanctions based on the filings in two forums. Professional challenged American's appeal of the sanctions order as frivolous and "outrageously" requested $68,000 for costs and attorney fees.

The *C.A. 4th* affirmed in part and reversed in part. The WCAB's exclusive jurisdiction is not limited to employees and employers and extends to all suits regarding compensation and payment of benefits to injured workers. "Just as the WCAB's jurisdiction covers bad faith or fraud claims against workers' compensation carriers, so too it covers fraud claims against medical or medical-legal line claimants. Fraudulent workers' compensation claims should be stopped at the source, in the

workers' compensation system. Medical clinics that submit false medical-legal evaluations can be detected and halted under existing law, which sets up a tripartite scheme involving the WCAB, the insurance commissioner and public prosecutors." However, American did not engage in sanctionable conduct by filing the tort complaint. The complaint was not objectively frivolous and presented a matter of first impression of arguable merit. The Legislature had not expressed a clear intent as to which intentional torts are pre-empted by workers' compensation. Although much of the conduct by American's trial attorneys was "disquieting," it was important that they should have been given a full and fair opportunity to confront the charges and explain their actions. They were denied adequate notice and the sanctions could not stand. No sanctions were warranted on appeal.

American International Adjustment Co. v. Crawford, C.A. 4th, No. G015835, filed January 9, 1997 by Crosby, J.

The full text of this case appears in 97 Daily Journal D.A.R. 423, January 13, 1997.

State Supreme Court Highlights

During their conference, the justices took the following actions:

GRANTS

WORKERS' COMPENSATION: The justices agreed to decide whether a workers' compensation insurer should have been sanctioned for filing a massive tort suit against a group of medical clinics, accusing them of fraudulent billing practices in 158 compensation claims.

American International Adjustment Corporation filed the suit in 1993 against five clinics allegedly controlled by Dr. Byron Crawford, claiming it paid $519,369 in fraudulent billings. Three days later, AIAC filed a restitution petition for the same amount with the Workers Compensation Appeals Board.

But Orange County Judge Robert J. Polis not only denied AIAC's request for a preliminary injunction, he imposed sanctions on his own motion for $62,074 for filing suit in bad faith.

On Jan. 9, the Court of Appeal in Santa Ana upheld Polis' decision that AIAC's suit was barred by the exclusive remedy provided by the workers' compensation system, but said he failed to give sufficient notice of the basis for the sanctions.

Writing for the court, Justice Thomas Crosby said the workers' compensation system is the place to hear AIAC's complaint, not the court system. "It is for this

reason we are unwilling to sanction the crude, blunderbuss type of tort weapon plaintiff proposes," Crosby wrote.

Voting to review the appeal court decision in *American International Adjustment Co. v. Crawford*, 51 Cal.App.4th 1489 (1997), were Chief Justice Ronald M. George and Justices Stanley Mosk, Joyce L. Kennard, Marvin R. Baxter, Kathryn Mickle Werdegar, Ming W. Chin and Janice R. Brown.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY, a California corporation, Appellant, v. JAMES W. EISENBERG, an individual; et al., Appellees,	Ninth Circuit Nos. 94-55983 94-56138 94-56188 District Court No. CV-92-6267 AAH Central District of California
LIEN COLLECTIONS, INC., Counter-Complainant and Cross-Appellant, v. ZENITH INSURANCE COMPANY, Counter-Defendant and Cross-Appellee,	
JAMES W. EISENBERG MEDICAL CORPORATION, Counter-Complainant and Cross-Appellant, v. ZENITH INSURANCE COMPANY, Counter-Defendant and Cross-Appellee.	

APPELLEES' OPENING BRIEF

* * *

B. Activities Occurring Within the Claims Adjustment Process Constitute The Business of Insurance.

The United States Supreme Court has recognized that the "claims adjustment process" involves the "business of insurance." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 [102 S.Ct. 3002, 73 L.Ed.2d 647] (1982). In *Union Labor,* a chiropractor sought injunctive relief under federal antitrust laws against Union Labor's use of a Peer Review Committee to determine the propriety of chiropractic charges. Union Labor moved for summary judgment on the basis that the Peer Review Committee was part of the "business of insurance" and, therefore, the chiropractors' federal actions were barred by the McCarran-Ferguson Act. The majority of the Court disagreed and held that the use of the Peer Review Committee was ancillary to the claims adjustment process because the Committee was not the claims adjuster and its recommendations were non-binding. However, the Court expressly noted:

> Unlike activities that occur wholly within the insurance industry – *such as the claims adjustment process itself* – the ancillary peer review practices at issue in these cases "involve parties wholly outside the insurance industry." *See Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. at 231, 99 S.Ct. at 1083. Thus peer review

> falls afoul of the third Royal Drug criterion in a way in which pure claims adjustment activities cannot.

Id., 102 S.Ct. at 3011 n. 8. (Emphasis added.)

Other courts have similarly held that "the adjustment and settling of claims is a practice traditionally regarded as the business of insurance." In *Manasen v. California Rental Services*, 424 F.Supp. 657, 666 (N.D. Cal. 1976), *reversed on other grounds*, 638 F.2d 1152 (9th Cir. 1979), the court stated:

> The teaching of these cases is that the protection afforded by the McCarran Act is not strictly limited to insurance companies. The McCarran Act is concerned with the "business of insurance," and thus it is the nature of the challenged conduct which must be examined in determining whether the exemption applies. *Royal Drug Co. v. Group Life & Health Insurance Co., supra.* The authorities further reflect the fact that a wide variety of activities which have a substantial effect on rate-making, including the settlement of claims and the limitations of costs, are embraced within the definition of "business of insurance."

See also, Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, 83 (3rd Cir. 1973); *Lee v. Prudential Ins. Co. of America*, 673 F. Supp. 998, 1001 (N.D. Cal. 1987) (California's claims handling statute involves the "business of insurance" because it "explicitly mandates the manner in which insurers shall settle claims, and

therefore is specifically directed :to the enforcement of the insurance policy").[4]

In this action, Zenith seeks damages caused by Appellees' alleged fraudulent use of the workers' compensation claims adjustment process. *See* Zenith's RICO Case Statement, C.R. 89, Appellant's E.R. 9, at 19-35. Zenith alleges that Appellees (i) abused the "90630 RVS code," *id.* at 19-22; (ii) abused the "90642 and 90643 RVS codes," *id.*, at 22-25; (iii) abused the "90803 RVS code," *id.*, at 25-26; (iv) used "multiple RVS codes," *id.*, at 25-28; (v) used fraudulently "a different RVS code"; *id.*, at 29; and, (vi) misrepresented medical-legal treatment, *id.*, at 34-35. All of these claims involve the interpretation of California's Official Medical Fee Schedule as it existed prior to July, 1993, or the reasonableness of medical treatment, functions delegated to the WCAB in the workers' compensation mandatory claims adjustment process. The

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[4] Commentators have expressed the opinion that claims adjustment and settlement are the single most important element of the "business of insurance." *See* J. Wickman, *Evaluating the Health Insurance Risk* 57 (1965) ("[u]p until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance is the claims proceeds"); Butler, *Loss Adjustment in Fire Insurance, in Property and Liability Insurance Handbook* 219 (J. Long & D. Gregg eds. 1965) ("[t]he adjustment (including payment) of claims represents the final act in the insurance process"); C. Cissley, *Claims Administration: Principles and Practices III* (1980) ("[c]laim administration is the best link in the process of insurance – a process that begins with actuarial analysis and continues through sales, underwriting, investment, and policy services . . . "); Case Comment, 65 Minn. L. Rev. 1187, 1201-02 (claims adjustment should be regarded as the "business of insurance").

very essence of this action involves determining exactly what, if anything, Appellees are entitled to on their liens. Such a determination is clearly part of the "business of insurance." *See e.g., Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 324, 324-325 (D.C. Cir. 1982) *cert. denied* 459 U.S. 839 [103 S.Ct. 86, 74 L.Ed.2d 81] (1982). (" . . . the alleged agreement pertains to the adjusting and settling of claims, a practice traditionally regarded a part of the insurance business").[5]

Now, instead of allowing the WCAB to determine both the propriety of the billings and the extent of Zenith's duties to indemnify medical providers, Zenith requests that a United States District Court conduct such review for over 45 workers' compensation claims in the guise of a RICO action.[6] Zenith seeks to employ both

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[5] Zenith admits that all of the above-described alleged predicate acts occurred within the context of the claims adjustment process mandated by the California Workers' Compensation Act:

> LCI applies to the Workers' Compensation Appeals Board (the "WCAB") for adjudication of the liens and prosecutes the liens at hearings and settlement conferences. Where extensive litigation before the WCAB or formal legal expertise is required, Libott Law, under the name Libott Law Office, represents Eisenberg Medical's interest.

Zenith's RICO Case Statement, C.R. 89, Appellant's E.R. 9, at 107.

[6] The 45 cases mentioned by Zenith are but a prelude to the thousands and thousands of cases embodied in its suit. For example, Zenith has requested through discovery information

federal court procedures and RICO remedies to supersede the claims handling and adjustment function of the WCAB. However, the McCarran-Ferguson Act precludes the District Court from supplanting the WCAB's function as claims adjuster of medical liens.

Zenith's argument that Appellees' activities in the claims adjustment process do not constitute the "business of insurance" is premised on its erroneous claim that: "[t]he McCarran-Ferguson Act is to be narrowly construed. . . . " Zenith's Opening Brief, at 24. In support of this claim Zenith cites *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied* 467 U.S. 1240 [104 S.Ct. 3509, 82 L.Ed.2d 819] (1984), a 1983 antitrust case. As the Supreme Court made clear in *Fabe*, the strict construction of the "business of insurance" applies *only* in the antitrust context, while a broad construction must be applied where state law regulation of activities in the "business of insurance" is involved. *Fabe, supra,* 113 S.Ct. at 2209-2210.

Next, Zenith attempts to dismiss the application of *Fabe* by claiming Zenith's allegations of "fraud" necessarily remove Appellees' conduct from the business of insurance. Pursuant to Zenith's argument, the McCarran-Ferguson Act could never bar a RICO claim premised on fraud. This is incorrect. *See e.g., American International*

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relating to workers' compensation claims dating back to January 1, 1983. (C.R.113, Exhibit E, Appellees' E.R. 7).

Moreover, many of the 45 claims referenced in Zenith's suit were settled or adjudicated within the California workers' compensation system by the time the District Court ordered the case dismissed. (C.R. 115, Appellant's E.R. 3, at 769-773).

Group, Inc. v. Superior Court, supra, (McCarran-Ferguson Act barred application of RICO); *LeDuc v. Kentucky Central Life Ins. Co., supra,* (McCarran-Ferguson Act barred application of RICO). In *Wexco Inc. v. IMC, Inc.,* 820 F.Supp. 194, 201 (M.D. Pa. 1993), the court dismissed the identical argument as inconsistent with applicable Supreme Court precedents:

> For its own reasons, this court agrees with Defendants that the "fraud is not the business of insurance" approach should not be followed. When a plaintiff invokes an action under a relevant federal law against insurance entities, it is presumably because the plaintiff believes that the entities have acted improperly, in violating that law. Limiting the court's McCarran-Ferguson examination of those entities' activities to their wrongful character is inconsistent with the existence of Supreme Court precedents directing courts on the proper examination to make in such circumstances. Given that wrongful conduct is always alleged, an approach that concludes that wrongful conduct is never the "business of insurance" would leave no occasion for. courts to apply the principles that the Supreme Court has provided. To say that "fraud is never the business of insurance" is to start down that road.

See also United States Borax and Chemical Corp. v. Superior Court, 167 Cal.App.3d 406, 410 [213 Cal.Rptr. 155] (1985), wherein allegations of wrongdoing were insufficient to take the case out of the Workers' Compensation System (" . . . the Legislature, in enacting the workers'

compensation system, had intended to vest therein jurisdiction of all such work-related claims, notwithstanding pleading embellishments about fraud.")

In sum, Zenith's self-serving hyperbole and conclusory allegations cannot transmute the "business of insurance" into something else.

* * *